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Honour in UK Copyright Law is Not ‘A Trim Reckoning’ – its Impact on the Integrity Right and the Destruction of Works of Art

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Abstract - The meaning of ‘honour’ in section 80 of the Copyright Designs and Patents Act 1988 is not easily ascertained. There has been a tendency for academics and judges to either equate the concept of ‘honour’ with that of ‘reputation’, or to ignore its presence altogether. The author will propose that there is little to justify such treatment of this concept. This article offers a re-interpretation of the concept by analysis of anthropological theories of honour and of the Roman law of *iniuria*. By applying such re-interpretation, it is argued the concept of honour would play a far more significant role in articulating the integrity right under section 80 than previously envisaged. In particular, by interpreting ‘honour’ as a right to respect, it opens up the possibilities of recognising the artist’s right to object to the destruction of his works, a right which is presently unrecognised in UK copyright law.

Keywords – copyright, moral rights, art, honour, anthropology, *iniuria*

‘What is honour? A word. What is in that word honour? What is that honour? Air. A trim reckoning!’

William Shakespeare, Henry The Fourth Part I (V, ii, 132)

1. Introduction

Falstaff in Henry the Fourth Part I views honour as a mere word, ‘air’, ‘a trim reckoning’, a trifling with no concrete or substantial meaning. The character dismisses ‘honour’ and its abstract notions (‘Doth he feel it? No. Doth he hear it? No.’) as having no use whatsoever in real life. Falstaff’s speech on ‘honour’ is revelatory of at least one aspect of the concept of honour – its elusiveness. Nowhere does the meaning of honour elude us more than the reference made to it in section 80 of the UK Copyright Designs and Patents Act 1988 (CDPA).

Sections 77 to 89 of the CDPA enshrine the English version of the moral rights doctrine, which governs the relationship between an author and his work. The scope of the doctrine varies from jurisdiction to jurisdiction, with the UK only recognising four rights,¹ one of which is the integrity

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¹ The four rights are the Paternity Right, Integrity Right, False Attribution Right and Privacy Right.

right framed in sections 80 to 83, which is the right of an author to object to a mistreatment of his creation, providing such mistreatment is derogatory and prejudicial to his honour or reputation. The present wording of section 80 which mentions ‘honour’, is owed to the UK’s implementation of Article 6*bis* (1) of the Berne Convention, which reads as follows,

Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his *honour* (author’s emphasis) or reputation.

The reference to honour in Article 6*bis* has been viewed as an unnecessary appendage in the common law, leading to at least one common law jurisdiction precluding any reference to honour altogether in its moral rights legislation.² The omission of ‘honour’ from the WIPO Performance and Phonograms Treaty too has led one common law academic to observe that the concept was obsolete.³ According to Adeney, ‘honour’ is commonly regarded as adding nothing to the concept of ‘reputation’ and the term “remains unused and undefined in the United Kingdom.”⁴

The concept of honour is relatively unknown in the common law, except for recent interest in cases involving honour killings, in discussions on the concept of reputation as used in the law of defamation,⁵ and its inclusion in section 80 CDPA. However, despite its inclusion in section 80, it has curiously been in the main, overlooked by law academics, save for a handful of articles, mostly penned by antipodean academics in their analysis of amendments to the Australian Copyright Act,⁶

² Copyright and Related Rights Act 2000 (Ireland), s 109 (1).

³ Patricia Loughlan, ‘The Right of Integrity: What is in that Word Honour? What is in that Word Reputation?’ (2001) 12 Australian Intellectual Property Journal 189. Loughlan also refers to Falstaff’s speech on “honour”.

⁴ Elizabeth Adeney, ‘The moral right of integrity: the past and future of "honour"’ (2005) 2 Intellectual Property Quarterly 111.

⁵ Lawrence McNamara, *Reputation and Defamation* (OUP Oxford 2007), 42-56; Robert C Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ 74 California Law Review 691.

⁶ Loughlan (n 3); Dean Ellinson and Eliezer Symonds, ‘Australian Legislative Protection of Copyright Authors’ Honour’ (2001) 25 Melbourne University Law Review 623; Elizabeth Adeney, ‘Defining the shape of Australia’s moral rights: a review of the new laws’ (Intellectual Property Quarterly) (2001) 4 291; Elizabeth Adeney, ‘Authors’ rights in works of public sculpture: a German/Australian comparison’ (2003) 33 International Review of Intellectual Property and Competition Law 164; Dennis Lim, ‘Prejudice to Honour or Reputation in Copyright Law’ (2007) 33 Monash University Law Review. See also Adeney, ‘The moral right of integrity: the past and future of "honour"’ (n 4) for a detailed analysis of French and German legal sources regarding the concept of ‘honour’.

and discussions in UK practitioner and specialist texts.⁷ Much of what has been written about honour however appears to focus on the role it plays in imbuing the moral rights provisions with subjectivity, rather than engaging in an in-depth study of its meaning and in what circumstances it would be prejudiced, in contrast to circumstances where reputation is being prejudiced. Furthermore, as will be discussed later, judges in the few UK cases on the integrity right appear to treat “honour” as synonymous with “reputation”, generally neglecting to give full consideration to the concept of “honour” itself.⁸

More in-depth scholarship on the concept of “honour” is therefore useful and important given the apparent judicial reluctance to engage with the concept fully, and especially since it holds a key position both within Article 6*bis* and Section 80. It is clear, as will be explained later, that the legislators of Article 6*bis* envisaged interests extending beyond merely reputation, and any further light which can be thrown upon the concept of “honour” is long overdue. It is the aim of this article to cast this much needed light. It is peculiar that such a specific criterion prescribed in the legislation has been given such scant attention and application. This article thus aims to shed further light on the meaning of honour as it is positioned within section 80, not only from a doctrinal analysis of relevant legislation and case law, but also from the perspectives of Roman Law, in particular its formulation of *iniuria*, and of anthropological studies on honour. It is hoped that this article will contribute fresh insights into the concept of honour which will help to clarify the boundaries of the integrity right, in particular, the question of whether destruction of a work amounts to a breach of the integrity right. At present, the conventional view is that as destruction leaves nothing of the original work behind, there can be nothing left that can affect the author’s reputation, unlike a work which has been maltreated or deformed in some way, which does leave behind a misrepresentation of the author’s work.⁹ However,

⁷ Jonathan Griffiths, ‘Not such a ‘Timid Thing’: the UK’s Integrity Right and Freedom of Expression’ in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (OUP Oxford 2005) paras 9.40-9.50; Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006) paras 14.69-14.75; Gillian Davies and Kevin Garnett, *Moral Rights* (1st edn, Thomson Reuters (Legal) Limited 2010) paras 8-036 - 8-040.

⁸ Griffiths (n 7) para 9.43.

⁹ Destruction is not specifically provided for under Article 6*bis* of the Berne Convention. However, a Resolution was passed at the Brussels Revision Conference which encouraged countries to adopt moral rights which could protect against the destruction of works. For arguments against destruction, see Edward Damich, ‘The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors’ (1988) 23 Georgia Law

even if destruction does not affect the author's reputation, it is arguable that it can impact upon his honour. It is this article's contention that there has been disproportionate emphasis or reliance on 'reputation' where the integrity right is concerned, and that equal weight should be afforded 'honour'. One of the main reasons why 'honour' has not been referred to or applied as much as 'reputation' lies in the uncertainty surrounding its meaning,¹⁰ while that of reputation has been well established, particularly within the law of defamation. In the few instances 'honour' is defined or applied however, it is usually defined as 'what a person thinks of himself.'¹¹ If so, this has a strongly subjective element, which poses the risk of allowing unreasonable claims by hypersensitive artists. This article will offer a re-interpretation of 'honour' which will allow for a more objective approach, thus avoiding the aforementioned difficulty regarding oversensitive artists. Essentially, it is suggested that prejudice to honour amounts to an insult, and that the destruction of an author's work clearly amounts to an insult to the author, and hence prejudicial to the honour of the author. It will be shown, from examining the influence Roman Law had on the early development of the common law, and from applying the theoretical insights of Frank Henderson Stewart, an eminent anthropologist,¹² that the concept of 'insult' as a viable cause of action is not as alien to the common law as is presumed, and hence it would not be too much of a stretch to accept that the common law is capable of recognising affronts to honour, and that it is not an obsolete concept.

If prejudice to honour amounts to an insult, the question is whether the destruction of a work amounts to an insult to its author and is prejudicial to his honour. The answer is arguably in the affirmative, taking into account, the depth of feeling an author possesses for his creations, and the investment of the author's energy, creativity and personality into the creation of the work. The author

Review 1, 18; P Anand, 'The Concept of Moral Rights Under Indian Copyright Law' (1993) 27 Copyright World 35; Irini A Stamatoudi, 'Moral Rights of Authors in England: the Missing Emphasis on the Role of Creators' (1997) 4 Intellectual Property Quarterly 478, 482-483; Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st edn, Oxford University Press 2011) 45; WR Cornish, D Llewelyn and TF Aplin, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights* (8th edn, Sweet & Maxwell, Limited 2013) 522.

¹⁰ Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2009) 257.

¹¹ *ibid.*

¹² Professor Frank H Stewart is currently Professor of Islamic and Middle Eastern Studies at the Hebrew University of Jerusalem. His book, *Honour*, borne out of conducting ethnographic studies on Bedouin tribes, argues that the concept of 'honour' is essentially a right to respect. See Frank Henderson Stewart, *Honor* (University of Chicago Press 1994).

not only utilises his work to communicate a personal message, it also symbolises his personality. His desire to maintain the integrity of his work is understandable.¹³ Destruction of a work is therefore akin to destroying not only the message the author wishes to convey but also something which is an embodiment of his personality. The act of destruction demonstrates utter disregard and contempt for the work, and hence utter disregard and contempt for the author's message and personality. Destruction of a cherished work surely insults and dishonours its author.

Furthermore, as mentioned above, while much has been made of the subjectivity or objectivity of the moral rights provisions in judicial pronouncements and academic studies on the integrity right, it is submitted that, as there can be no ambiguity whatsoever as to the effect that destruction wreaks upon a work, any destruction of any work would amount to prejudice to an author's honour without the need for evaluating the subjectivity or objectivity of the treatment meted out to the work.

Any study of the word 'honour' will be fraught with considerable difficulty, as it is a concept which is not easily discernible. It has been described as a word 'rich in connotations, but poor in denotation'.¹⁴ It is ultimately contended that by giving full countenance to the word 'honour', the destruction of an author's creation does amount to an infringement of the integrity right.

2. Method, Sources and Structure

It is necessary at this juncture to outline and explain briefly the reasoning behind the method and choice of sources employed in formulating the thesis set out in this article, relying heavily as it does on uncommon sources, such as anthropological studies on honour, insult laws in Germany, early Anglo-Saxon and Norman laws, and the Roman law concept of *iniuria*.

In order to achieve the aims of the article, it would be necessary to seek out authoritative sources for alternative and workable meanings of the concept of 'honour'. As there is a paucity of

¹³ Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press 2010).

¹⁴ Charles Stewart, 'Honour and Shame' in J Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (2nd edn, Elsevier forthcoming 2015).

legal material on the concept, it is necessary to draw inspiration from a variety of sources from without the modern common law. The first of these sources are studies carried out by anthropologists, who are renowned for their extensive research into the meaning of honour. The seminal work on this area is *Honor and Shame*,¹⁵ a collection of essays edited by Peristiany, foremost of which is Pitt-Rivers' essay, "Honor and Social Status", which represent the first systematic studies ever conducted on the concept of honour, most of which were based on ethnographic fieldwork undertaken in the Mediterranean.¹⁶ The choice of the Mediterranean as a focus of scholarly research for anthropologists was not, as it may be thought, a purely and uniquely academic and reasoned decision, but the practical result of tumultuous world affairs which occurred during the same period in which this particular group of scholars were active. The Second World War and the upheaval it caused in many countries for decades to come ensured that many regions were inaccessible to anthropologists.¹⁷ Decolonisation of many African states also meant that those areas were out of bounds.¹⁸ Thus, for practical purposes, the Mediterranean was the geographical area of choice, particularly for scholars writing in English.¹⁹ It was in this area of the world that the first and most rigorous study on the concept of honour was undertaken, and also where the majority of anthropological research studies on 'honour' has taken place.²⁰ Hence, in any study of 'honour', as this article is, it would be necessary to refer to the work of Peristiany and Pitt-Rivers in the first instance, and draw out general and universal themes from their findings, despite the fact that their work was centred in the Mediterranean and not within an Anglicized or even Northern European culture or setting, which might appear to be more relevant to the present focus of this article. It is contended that the features of Mediterranean honour as discovered and described by the anthropologists are more universal in application than it would

¹⁵ *Honor and Shame: The Values of Mediterranean Society* (University of Chicago Press 1966).

¹⁶ See Patricia M Rodriguez Mosquera, Antony SR Manstead and Agneta H Fischer, 'Honor in the Mediterranean and Northern Europe' (2002) 33 *Journal of Cross-Cultural Psychology* 16 for a brief outline of the research conducted by anthropologists on 'honour' in the Mediterranean.

¹⁷ Dionigi Albera, 'The Mediterranean as an anthropological laboratory' [1999] *Seccion de Antropologia Social* 215; Christian Giordano, 'The Anthropology of Mediterranean Societies' in U. Kockel, M. Nick Craith and J. Frykman (eds), *A Companion to the Anthropology of Europe* (Wiley-Blackwell 2012).

¹⁸ Sandra Busatta, 'Honour and Shame in the Mediterranean' (2006) 2 *Antrocom* 75.

¹⁹ Albera (n 17), 215. The question as to whether there is an anthropology of the Mediterranean as a subspecialty is itself a much complex and heavily argued issue within the field of anthropology: see David Gilmore, 'Anthropology of the Mediterranean Area' (1982) 11 *Annual Review of Anthropology* 175; and Giordano (n 17), for discussions of this issue, which is outside the scope of this article.

²⁰ Mosquera, Manstead and Fischer (n 16) 16.

appear. A recent comparative study conducted in Spain and the Netherlands concluded that Mediterranean notions of honour were present in Dutch culture and society, and vice versa.²¹

This article will take issue with the work of Pitt-Rivers in particular, and rely on Frank Henderson Stewart's work on 'honour', which is no less esteemed. His work, which proposed that honour is a right to respect or not to be insulted, was heavily influenced by German jurists and German insult laws. It is of course not maintained that simply because the work of German lawyers happened to influence Stewart in formulating his particular take on 'honour', it should similarly be applicable in English common law. Taking a cue from Lord Justice Reed, who said that 'Foreign law may ... be treated as an authority, as an empirical fact, or as a source of ideas...',²² it is suggested that Stewart's and German ideas on honour are sources of ideas, from which inspiration may be taken in order to enlighten us on the meaning of 'honour'. Such use of foreign law will, as advised by Lord Justice Reed, 'assist the judge to elucidate the issues under domestic law, and to identify possible options for their resolution'.²³ The value of learning and seeking inspiration from other legal systems is encapsulated in what James Gordley has written about studying foreign law, that '...the jurists in all these so-called [legal] "systems" were struggling with common problems, guided by similar concepts ... not expressed clearly in their national legal systems.', and that '...we can learn much by seeing how others have faced similar problems.'²⁴

Finally, on the basis that 'honour' may be interpreted as a right to *respect* or right not to be *insulted*, this paper will examine the Roman law concept of *iniuria* i.e. disrespect, insult or outrage, and draw from it insights which would assist in framing a workable approach to interpreting 'honour' as it is placed within moral rights law. The use of Roman law to assist modern day common lawyers is not uncommon at all despite its obvious antiquity. A recent paper analysed the use of Roman law by the House of Lords in three relatively recent and important decisions, and argued that the influence of

²¹ *ibid* (n 16) 33.

²² Robert Reed, 'Foreign precedents and judicial reasoning: the American debate and British practice' (2008) 124 *Law Quarterly Review* 253, 265.

²³ *ibid* 268.

²⁴ James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press 2007) 3.

Roman law on the development of English common law is pervasive and of considerable value.²⁵ The same paper posits that the value of Roman law (or indeed any foreign law) rests in the fact that legal problems are both universal and perennial.²⁶ It is hoped that just as *iniuria* has proved valuable in informing the development of the common law of obligations, it will prove equally helpful in elucidating the concept of ‘honour’ in moral rights law.

3. Honour and Destruction in Section 80 CDPA and the Berne Convention

It is firstly necessary to examine the current legal landscape in which the concept of ‘honour’ resides, before we look beyond the law for inspiration. The relevant legislative provision is section 80 CDPA, which was the result of the UK’s implementation of Article *6bis* of the Berne Convention.

While numerous criticisms may be levied at the UK’s minimalist and inconsistent implementation of Article *6bis* of the Berne Convention, it is not the intention of this article to take issue with all of them, save for specific issues arising from the reference to ‘honour’ and to destruction of works. This section of the article firstly outlines the development of moral rights in the UK, followed by a consideration of the act of destruction under section 80, and a discussion of the interpretation of ‘honour’ in section 80 CDPA.

A. Moral Rights in the United Kingdom

Although the source for moral rights in the UK is the CDPA, which implemented the Berne Convention, such rights predate even the Berne Convention, originating in the civil law countries, notably France and Germany. The predominant conceptual model of the moral rights doctrine was developed in parallel in these two countries, through a series of mid-19th century court decisions,²⁷ subject to the influence of jurists, such as Morillot, Gierke and Kohler, and the philosophers Kant and Hegel, who espoused the view that a creation was the embodiment of its author’s personality.

²⁵ James Lee, ‘*Confusio*: Reference to Roman Law in the House of Lords and the Development of English Private Law’ (2009) 5 Roman Legal Tradition 24.

²⁶ *ibid* 38.

²⁷ See Adeney *The Moral Rights of Authors and Performers* (n 7) chapter 1; and Rajan (n 9) 51-88.

Although it is clear that France and Germany developed the theoretical basis for the moral rights doctrine, it is also equally clear that at some point English law did recognise the features of the doctrine as was expressed in Lord Mansfield's judgment in the early case of *Millar v Taylor* (1769).²⁸ Lord Mansfield's description of the evils which may befall an author was clearly a precursor of the moral rights doctrine:

He is no more master of the use of his own name. He has no control over the correctness of his own work, He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of.

Lord Mansfield argued that 'It is an injury, by a faulty, ignorant and incorrect edition, to disgrace (the author's) work and mislead the reader.' Lord Mansfield's affirmation of such a right at common law, was however overturned five years later in *Donaldson v Beckett*,²⁹ which held that the common law right was supplanted by the Statute of Anne, laying to rest the question of the existence of moral rights in English Law.

The original text of the Berne Convention did not provide specifically for moral rights until 1928 at the Rome Conference when the concept was first proposed, apparently much to the surprise of the common law countries, and which was 'coldly received' by the British countries.³⁰ The British contingent was eventually won over when the other delegates pointed out that what was proposed already existed in the common law.³¹

The UK's compliance with the Berne Convention underwent the scrutiny of the Gregory Committee in 1952 and again that of the Whitford Committee in 1977. Whilst the earlier Gregory Committee review judged that the Article 6*bis* rights were met with adequately in other areas of UK

²⁸ 4 Burr 2303, 98 Eng Rep 201 (1769).

²⁹ 2 Bro PC 129, 1 Eng Rep 837.

³⁰ S G Raymond, *Report of the New Zealand Delegate on the International Copyright Conference at Rome* (21 July 1928).

³¹ For example, the law of defamation and passing-off.

law, (e.g. defamation, contract etc) the later review found that the UK had not met its obligations under Article 6*bis*. In particular, where the integrity right was concerned, it was recognised by both committees that the UK had to rely on the law of defamation in order to fulfil its obligations in relation to the same. However, the Whitford Committee pointed out that in comparison with the integrity right formulated in Article 6*bis*, the law of defamation failed authors in at least two ways, firstly because for a defamation action to succeed, the public must have known that the claimant was the author and secondly, because an action for defamation dies with the person defamed, unlike the integrity right which endured beyond the death of the author.³² It was not until the enactment of the CDPA in 1988, which included sections relating to moral rights, that the moral rights doctrine was formally recognised within the UK.

B. The Status of Destruction under UK Moral Rights

Not only is there no provision for destruction under the CDPA,³³ as mentioned, one reason the integrity right does not include the act of destruction is the fact that nothing remains which may affect the author's honour or reputation. Apart from this, other reasons have also been posited. It has been argued firstly that the narrow and exclusive definition of 'treatment' under section 80 is unable to encompass destruction, and secondly, that the additional requirements of section 80 subsections (3), (4), (5) and (6), which call for the public communication of the derogatory treatment, would exclude at least private acts of destruction. Although these reasons are not the main focus of this article, it is contended as follows that they are possibly not as obstructive as it may be thought.

'Treatment' is a closed category of four distinctive acts: addition to, deletion from, alteration or adaptation, none of which may conceivably include 'destruction'. There has been, to date, no actual case on destruction of a work in the UK, thus still leaving open the question of the UK courts' likely interpretation of section 80 where destruction is concerned. Mr Justice Fysh has however commented

³² *Report of the Committee to consider the Law on Copyright and Designs* (Cm 6732, 1977) paras 52-53.

³³ It is worth noting that the Directive 2004/48/EC (Enforcement of IP Rights), implemented in the UK by The Intellectual Property (Enforcement, etc.) Regulations 2006, may apply to a breach of moral rights for causing 'moral prejudice', i.e. damage above and beyond economic damage. However, at the moment, destruction does not appear to constitute a breach of the integrity right in the UK. This means that even if the author has been unduly affected by it, beyond the economic damage suffered, he is unable to claim damages for 'moral prejudice'.

that ‘treatment’ was a ‘broad, general concept; de minimis act apart, it implies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of an entire work.’³⁴ Mr Justice Fysh further ventured that he saw ‘no legislative intention to limit the meaning of the word’ notwithstanding the wording of section 80(2), and that any limit to the generality of ‘treatment’ would arise from any prejudice which may result to the honour or reputation of the author.³⁵ Mr Justice Fysh also referred to the judgment delivered in *Amar Nath Seghal v Union of India*,³⁶ which stated that destruction could be considered the ultimate form of mutilation.³⁷ This is meaningful as the relevant section of the Indian Copyright Act is similar to Article 6bis of the Berne Convention.

Further, it has been suggested that destruction of a work may be considered to be distortion or mutilation carried out to its fullest extent,³⁸ or the ‘ultimate infringement of [artists’] moral rights’.³⁹ Professor Jacques de Werra states that to destroy is to ‘*nier purement et simplement l’existence de l’oeuvre, forme ultime de l’irrespect*’ i.e. to ‘deny the work its existence: the ultimate form of disrespect’.⁴⁰ Hence, it is arguably erroneous to conclude unreservedly that ‘treatment’ does not include the act of destruction.

The requirements set out in subsections (3), (4), and (6) of section 80 CDPA are a deviation from the requirements of Article 6bis of the Berne Convention. Subsections (3) and (4) provide that infringement only occurs if the derogatory treatment of a literary, dramatic, musical or artistic work is published commercially, exhibited, or performed in public. The subsections also specify the issuing to the public of copies of the film, sound recording, graphic work or photograph of the treatment.

³⁴ *John P Harrison v John D Harrison, Michael Harrison t/a Streetwise Publications and Mark Hempshell* [2010], ECDR, 3 (PCC) [60].

³⁵ *Harrison* (n 34) [60].

³⁶ Judgement delivered by Judge Pradeep Nandrajog, 117 (2005) DLT 717, 2005 (30) PTC 253 Del. See Mr Justice Fysh’s discussion *Harrison* (n 34) [61].

³⁷ *Harrison* (n 34) [31].

³⁸ Gerald Dworkin, ‘Moral rights in English law - the shape of rights to come’ (1986) 8 European Intellectual Property Review 329.

³⁹ Simon Newman, ‘Intellectual property law: Part II—The moral right of the author: The view from France, Germany and the United Kingdom’ (1997) 13 Computer Law & Security Review 96.

⁴⁰ Jacques de Werra, ‘Le droit à l’intégrité de l’oeuvre. Etude du droit d’auteur suisse dans une perspective de droit compare’ in H. Hausheer (ed), *Etudes de droit suisse* (Staempfli Editions 1997), translated by Teilmann-Lock in Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (First edn, DJOF Publishing 2009) 207.

Section 80 (6) provides that, in relation to a film, infringement occurs when the derogatory treatment is shown in public or copies of the derogatory treatment are distributed to the public.

Therefore, while Article 6bis states that the author has the right to object to derogatory actions *per se*, under UK law, subsections (3), (4) and (6) provide that the author may only do so if a *further act* has taken place, i.e. that basically the derogatory treatment of his work is publicised. The author in the UK has no redress against derogatory treatment *per se*, surely a departure from the intention of Article 6bis.⁴¹ However, it must be pointed out that although it may be very attractive to interpret section 80(1) as implying a right to object to derogatory treatment itself, Professor Adeney, in examining the legislative history behind section 80, thinks it highly unlikely that Parliament intended this outcome, and that it had always intended to limit the integrity right as set out in the subsequent subsections in section 80.⁴² The manner and extent to which subsections (3), (4) and (6) may affect destruction are discussed below.

The requirement in subsections (3), (4) and (6) that a further act of publication has to take place before infringement may be established, may present an obstacle to authors wishing to protest against the destruction of their works. This is especially so if, following the intricate analysis of the term ‘derogatory treatment’ by Davies and Garnett in *Moral Rights*, ‘derogatory treatment’ is interpreted as ‘the *result* of an action’, rather than ‘the *action of treating* a work’.⁴³ Davies and Garnett assert that the use of ‘derogatory treatment’ in the CDPA is ambiguous and is used in both possible senses. However, where subsections (3), (4) and (6) are concerned, the authors construe ‘derogatory treatment’ as clearly being ‘the result of an action’.⁴⁴

Evidently, if this is the case, total destruction of a work would leave nothing behind, i.e. there will not be any tangible *result* post act, and thus, could not be ‘commercially published’ for the purposes of section 80(3) or form the subject of a photograph or graphic work for the purposes of

⁴¹ Adeney (n 7) para 14.85.

⁴² *ibid* paras 14.83-14.84.

⁴³ See Davies and Garnett (n 7) para 8-026, at which the authors engaged in an analysis of the term ‘derogatory treatment’ in their discussion of the situation where a work is subject to a first treatment and its result subject to a subsequent treatment. Their analysis suggests that the term is used in both senses within the Act at different points, i.e. either as the action of treating a work, or as the result of the action.

⁴⁴ *ibid*.

section 80(4)(c). It is submitted that this particular interpretation of ‘derogatory treatment’, even for the purposes of subsections 80(3) and 80(4), is not absolutely clear and consistent. While it may be arguable that perhaps only the *result* of a treatment may be ‘commercially published’, ‘exhibited’ or be the subject of a photograph, the other acts stipulated in the subsections do not necessarily imply the same. For instance, section 80(3) also lists ‘*performs in public...a derogatory treatment of the work*’, which seems to suggest the *action* of treating a work. In such a situation, the public burning of a book or painting may fulfil this requirement. It could also be argued that the showing of a film of burning an artwork may fulfil section 80(4)(b).⁴⁵ Therefore, it is arguable that the public destruction of a work of art may fulfil these additional requirements, although it must be noted that a *private* act of destruction may possibly be excluded.⁴⁶

C. ‘Honour’ in section 80 CDPA and Article 6bis Berne Convention

The original proposed wording of Article 6bis at the Rome Conference referred to acts ‘which (are) prejudicial to moral interests’. The phrase raised grave concerns among the common law delegates who felt that the words were too vague to give any useful guidance or instruction. The wording was eventually amended to refer to acts ‘which would be prejudicial to his honour or reputation’,⁴⁷ which apparently was accepted without demurrer by the UK, and sealed its acceptance of Article 6bis notwithstanding its initial hostility to the proposal.

A few preliminary observations may be made on the inclusion of ‘honour or reputation’ in both Article 6bis and section 80. Firstly, although the phrase ‘moral interests’ in the original wording was deemed too vague, the inclusion of ‘honour’ has not served to remove ambiguity either, as its meaning is hardly consistent or settled. In contrast, reputation has a more established or familiar

⁴⁵ s 80(4)(b) provides that ‘In the case of an artistic work the right is infringed by a person who shows in public a film including a visual image of a derogatory treatment of the work or issues to the public copies of such a film.’

⁴⁶ Marjut Salokannel, Alain Strowel and with Estelle Derclaye, ‘Study contract concerning moral rights in the context of the exploitation of works through digital technology: Final Report’ Study Contract no °ETD/99/B5-3000/E° <http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf> accessed 30 September 2014, 143.

⁴⁷ Piola Caselli, the Italian delegate, reported that the representatives of the common law tradition had called for greater precision than “moral interests”. See General Report of the Drafting Committee, 204.

definition,⁴⁸ owing especially to its application in defamation law. This may also explain why judicial considerations of the integrity right appear to have focused on reputation rather than honour. For instance, in *Tidy v Trustees of the Natural History Museum*,⁴⁹ in which the plaintiff's cartoons were reproduced in a reduced size and colourised, Mr Justice Rattee could not conclude that there was prejudice to honour or reputation in the absence of any evidence from the public as to how the coloured reproduction would affect the plaintiff's reputation.⁵⁰ While Mr Justice Fysh in *Harrison* neither distinguished between honour and reputation nor explained the concepts in any detail, he made a similar point, referring to *Confetti Records v Warner Music*,⁵¹ that it was not easy to assess honour and reputation of which there had to be *evidence*. Furthermore, Mr Justice Fysh specifically referred to *professional* honour or reputation, although no further explanation is given for this restriction.⁵² As *evidence* of *professional* honour or reputation would generally come in the form of public opinion, again this echoes the test for reputation in defamation law.

Academic writers have also focused more on reputation. Although the authors in *Copinger & Skone James on Copyright* attempt to distinguish between reputation (by defining it as 'what is generally said or believed about the person') and honour (by defining it as 'associated with reputation and good name,...respect and position'), it is submitted that since their definitions of both concepts utilize very similar terms, they have not succeeded in making the distinction.⁵³ Furthermore, they assert that a claim under section 80 would require evidence that members of the public are likely to think less of the author, which echoes the test in defamation law, and which relates to 'reputation' rather than to 'honour'. Indeed, the authors do assert at the start of their discussion that the

⁴⁸ Loughlan (n 3) 189-190. See Bently and Sherman (n 10) 256-257 who state that 'the notion of reputation used in this context would be similar to that which is employed in defamation law'; Jon Holyoak and Paul Torremans, *Intellectual Property Law* (7th edn, Oxford University Press 2013) 260; and Griffiths (n 7) para 9.41

⁴⁹ [1996] 31 IPR 501 (HC). See Bina Cunningham, 'Moral rights' (1996) 18 European Intellectual Property Review D81 for a discussion of the case.

⁵⁰ It should be remembered that *Tidy* was an action for summary judgment and hence there was little scope for more in-depth discussion of the issue.

⁵¹ *Confetti Records, Fundamental Records and Andrew Alcee v Warner Music UK Ltd (t/a East West Records)* EWHC (2003) ECDR, 1274 (Ch) [157].

⁵² *John P Harrison v John D Harrison, Michael Harrison t/a Streetwise Publications and Mark Hempshell* (n34) [64].

⁵³ K M Garnett and others, *Copinger and Skone James on Copyright* (Sweet & Maxwell 2011) in Part II, para 11-45.

requirement for prejudice to honour or reputation bears ‘close resemblance to existing personal rights under the law of defamation and passing-off’. The word ‘reputation’ is also used on its own several times in the relevant passages on this issue, without reference to ‘honour’. Mr Justice Overend, in discussing the meaning of ‘honour and reputation’ in *Pasterfield v Denham*,⁵⁴ referred to Laddie, Prescott and Vitoria, who explained that the concept in the Act is ‘akin to libel’,⁵⁵ while Cornish, writing on the introduction of moral rights in the CDPA, thought that the reference to ‘honour or reputation’ had only a marginal advance, if any, on the concept of defamation.⁵⁶

Notwithstanding the ambiguity of the concept of honour, the fact remains that ‘honour’ is specifically included in not only an international treaty but also in the national legislation. Academic and judicial disregard for the same is therefore questionable. If honour is to be disregarded, there must be good reason for doing so. At present, there is little rationale for this treatment.

Another explanation for the scant attention paid to honour lies in treating ‘honour’ as synonymous with ‘reputation’. The interpretation of ‘honour and reputation’ favoured by judges and academics alike seem to favour the definition of reputation as it is established in libel law. The possible reason for such interpretation lies in the wording of section 80, i.e. ‘prejudicial to the honour or reputation of the author or director’. It mirrors the English version of Article 6*bis* but is subtly different to that of the French version of Article 6*bis* i.e. ‘prejudicial to his honour or to his reputation’. While it is possible for ‘honour’ and ‘reputation’ to be treated interchangeably in the English version and the UK legislation, there is no such ambiguity in the French version.⁵⁷ If there is a divergence in interpretation, the question is which text should take precedence. While the Paris text of the Berne Convention provides that both the English and French versions of the Berne Convention are authoritative,⁵⁸ Article 37(1)(c) provides that, in differences of interpretation, the French version shall

⁵⁴ *Pasterfield v Denham and Another* [1999] FSR 168, 181.

⁵⁵ Prescott and Vitoria Laddie, *The Modern Law of Copyright and Designs* (2nd edn, 1995) para 27.18, 1016.

⁵⁶ W R Cornish, ‘Moral rights under the 1988 Act’ (1989) 11 *European Intellectual Property Review* 449.

⁵⁷ Adeney, ‘The moral right of integrity: the past and future of “honour”’ (n 4).

⁵⁸ Article 37(1)(a) of the Paris Text of the Berne Convention states that ‘This Act shall be signed in a single copy in the French and English languages...’ while Article 33(1) Vienna Convention on the Law of Treaties states that where a treaty has been authenticated in two or more languages, the text in each language is equally authoritative unless the treaty provides that in the case of divergence, one of the languages will prevail, thus

prevail, which renders the French version of the Berne Convention as the final and most authoritative version of the Berne Convention.⁵⁹ Therefore, if preference is given to the French version in this regard, then it is clear that ‘honour’ and ‘reputation’ have different meanings and that they play different roles. Further, according to Adeney, the fact that the delegates at the 1948 Brussels Conference in considering a revision of Article 6*bis* opted to retain both “honour” and “reputation” clearly indicated that they viewed “reputation” and “honour” as distinctly separate concepts, and that honour supplemented reputation.⁶⁰

The question that remains is what exactly is the definition of ‘honour’? As stated above, there is a myriad of definitions of honour, and scholars in different fields have expounded conflicting theories on the concept of honour. While it would not be possible to seek out a definitive conception of honour, for present purposes, a more constructive approach would be to seek out a theory of honour which would be of most assistance to common law lawyers, particularly those interested in the concept as applied within moral rights

4. Tracing the Meaning of ‘Honour’: the Anthropological View

As the common law appears unable to provide any guidance on the meaning of ‘honour’, guidance is sought from other academic fields in order to illuminate this elusive concept. It must be cautioned that even within the field of anthropology, where the concept has been given more coverage and attention than it has been given in the legal field, the concept is nevertheless subject to numerous disagreements among anthropologists.

Anthropologists have researched into the concept in great depth, by participating in ethnographic research of various communities in the Mediterranean in particular. Indeed, ‘anthropologists now seem to be considered *the* experts on the subject [i.e. ‘honour’]’.⁶¹ Not all

providing that both the French and English versions are the authentic and authoritative versions of the Berne Convention unless there is a divergence in interpretation.

⁵⁹ Martin Sentfleben, *Copyright, Limitations, and the Three-step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004) 114.

⁶⁰ See discussion of the delegates’ views on ‘honour’ at the Brussels Revision Conference in 1948 in Adeney, ‘The moral right of integrity: the past and future of “honour”’ (n 4) 124.

⁶¹ Stewart (n 12) ix.

variations of the concept as defined by anthropologists will be relevant to moral rights law, being as they are, concentrated on issues related to social phenomena such as battlefield bravery, shame in adultery, honour killings and duels. However, it is possible to tease out the central and general themes which may be of assistance to lawyers. This is by no means the first and only attempt to make reference to anthropology in ascertaining the meaning of honour; John Beckerman, for instance, refers briefly to the work of anthropologists in his essay on honour and trespass,⁶² although not in any depth.

Julian Pitt-Rivers, the renowned anthropologist, is regarded as ‘the leading authority on honour’,⁶³ and considered as ‘anthropology’s chief explicator on honour and shame.’⁶⁴ As such, it is necessary to engage in the first instance with what he had to say on the subject, before proceeding to consider other notions of ‘honour’, in particular the definition expounded by Stewart, which as will be argued, is central to the thesis developed in this article. Pitt-Rivers’ seminal essay, *Honour and Social Status*,⁶⁵ was a study of Andalusian *pueblo*, a series of towns or villages in Spain. He discovered different variations on the meaning of honour as it manifested in these communities, ranging from the loss of honour as a result of cuckoldry, preservation of honour through the preservation of a woman’s virtue and the differences in the systems of honour as understood between the upper and lower strata of society. His essay was not only an observation of these different manifestations of honour, but it also provided, in its first part, a brief description of honour as understood in Western European society generally. Indeed, through his study, he concludes that ‘not only what is honourable but what honour *is* have varied within Europe from one period to another, from one region to another and above all from one class to another.’⁶⁶ Notwithstanding his observation of honour as a shifting and variable concept, he does, at the start of his essay, drill down the basic themes of honour, which is defined thus: ‘Honour is the value of a person in his own eyes, but also in the eyes of his society. It is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of that claim,

⁶² John S. Beckerman, ‘Adding Insult to *Iniuria*: Affronts to Honor and the Origins of Trespass’ in Morris S. Arnold and others (eds), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (The University of North Carolina Press 1981).

⁶³ Stewart (n 12) 1.

⁶⁴ Susan Tax Freeman, ‘Julian A Pitt-Rivers (1919-2001)’ (2004) 106 *American Anthropologist* 216.

⁶⁵ Julian Pitt-Rivers, ‘Honour and Social Status’ in Jean G. Peristiany (ed), *Honour and Shame: the Values of Mediterranean Society* (University of Chicago Press 1966).

⁶⁶ *ibid*

his excellence recognised by society, his right to pride.’ In this definition, apart from references to the subject’s perception or estimation of his own value, honour does take on features which are more familiar to the concept of reputation. The question is whether Pitt-Rivers’ definition is, being as it is formulated by someone who is regarded as a leading authority on honour, the final word on the matter?

Whilst Pitt-Rivers’ reputation as a leading exponent of the concept of honour is undisputed, there is criticism to be made about his approach to studying the concept, in particular, his declaration that very little has been said on the subject,⁶⁷ apart from medieval and chivalric references to honour.⁶⁸ As fellow anthropologist Stewart points out in *Honor*, much sophisticated work on the concept has been undertaken by jurists, in particular, German jurists in the nineteenth and twentieth centuries, whose works appear to have been ignored by Pitt-Rivers.⁶⁹ Hence, it would appear that Pitt-Rivers’ definition, authoritative as it may be, is not absolute. Stewart presents an alternative theory which, influenced as it is by legal writings, may be of considerable assistance to common law lawyers who are interested in the concept of honour.

Essentially, Stewart’s concept of honour is that it is a right to respect or as having a certain worth.⁷⁰ By viewing honour as such, it accounts for insults, which he says the Pitts-River account does not. As mentioned above, Pitt-Rivers’ two pronged definition of honour involves self-evaluation as well as valuation by society, in other words, there is an inner quality of honour as well as an outer one. He was not the only one to have explained honour as such. Schopenhauer, in his work, *The Wisdom of Life*, declares honour as ‘on its objective side, other people’s opinion of what we are worth; on its subjective side, it is the respect we pay to this opinion.’ Stewart attacks this formulation of honour, what he calls the ‘bipartite’ theory of honour. He says that it does not account for the

⁶⁷ Julian Pitt-Rivers, ‘La Maladie de l’honneur’ in Marie Gautheron (ed), *L’honneur: image de soi ou don de soi un ideal equivoque* (Editions Autrement 1991).

⁶⁸ Of which, Falstaff’s speech in Henry the Fourth Part 1 is an example.

⁶⁹ Pitt-Rivers in turn has critically reviewed *Honor*, saying that Stewart did not seem interested in the different senses of the word as used in the Mediterranean, and has not discussed in detail various studies conducted by other anthropologists on the Bedouin. Essentially, without actually addressing Stewart’s main thesis that honour is a right to respect, Pitt-Rivers criticises *Honor* as not doing what it says on the tin. Julian Pitt-Rivers, ‘Review of Frank Henderson Stewart’s *Honor*’ [EHESS] (1997) 37 L’Homme 215.

⁷⁰ Stewart (n 12) 21.

meting out of insults, which is still an offence in much of Europe.⁷¹ He cites the example of being called a 'swine'. Such name calling, under the bipartite formulation, would neither damage the inner quality of honour, nor the outer quality of honour, especially if not made in public. However, such name calling is clearly an insult, which amounts to an offence. His solution, to recognise honour as a *right*, essentially a right (or *claim*) to respect,⁷² would account for insults, in other words we have a right not to be insulted. While honour may be a right or claim by the individual to respect, the world has a duty to treat the bearer of honour with respect.⁷³ The utility of the concept of honour as a right to the fields of anthropology and ethnology is that it is a feature which is widely shared among different cultures.⁷⁴ Where the law is concerned, by framing the otherwise nebulous concept of honour as a right, it appeals naturally to lawyers, and could serve to clarify honour's meaning and utility when calls for its application are made, as is in the case of Article 6*bis* and section 80. It is also appealing for lawyers to apply Stewart's conception of honour as a right, as his thesis was influenced profoundly by German legal literature of the nineteenth and early twentieth centuries.⁷⁵

Stewart's model of honour thus owes its formulation to German juristic literature on German insult laws. As recent as the 1950s and 1960s, the German courts defined honour as a right. According to Stewart, a German Federal Court defined honour as 'the right of a human being that their personality be respected'.⁷⁶ Stewart very briefly traces the lineage of this right in German law back to Kant's axiom which declared that 'Every man has a legitimate claim to respect from his

⁷¹ International PEN's Writers in Prison Committee, *Insult Laws in the European Union, A Silent Threat* (2007)

⁷² Stewart (n 12) 146-7.

⁷³ *ibid* 21.

⁷⁴ Stanley Brandes, 'Review of Honor by Frank Henderson Stewart' (1996) 23 *American Ethnologist* 151. The Stewart model has not only been acclaimed in several academic reviews, but also regarded favourably compared with the bipartite theory of honour: see Matthew T Racine, 'Service and Honor in Sixteenth-Century Portuguese North Africa: Yahya-u-Tacuft and Portuguese Noble Culture' (2001) 32 *The Sixteenth Century Journal* 67. It has been relied heavily in at least one study on a case of honour killing: see Antonio Sorge, 'Review of In Honor of Fadime: Shame and Murder by Unni Wikan' (2008) 50 *Anthropologica* 435.

⁷⁵ Stewart praises the writings of German jurists as 'the most intensive and sophisticated discussion of honor in any European language', see Stewart (n 12) 1, and devotes an appendix on the development of honour as a right in Germany. Reviewers of his book have noted the influence of German legal literature on his work: Talal Asad, 'Book review of Honor by Frank Henderson Stewart' (1996) 116 *Journal of the American Oriental Society* 308; Walter P. Zenner, 'Book review of Honor by Frank Henderson Stewart' (1999) 6 *Islamic Law and Society* 119

⁷⁶ Stewart (n 12) 151.

fellow man',⁷⁷ and discussed this claim or right to respect in close connection to the concept of honour.⁷⁸

There is therefore a school of thought, rooted in philosophy, law and through Stewart, anthropology, which has actively advanced the idea that honour is simply a right to respect. Indeed, a paper published in 2001 on 'honour' in the Australian Copyright Act also puts forward this claim, although on different basis, by simply referring to the definition of the word 'honour' in the New Shorter Oxford English Dictionary,⁷⁹ and to the Australian Attorney-General's speech on the amendments to the Australian Copyright Act.⁸⁰ Interestingly, although it is mentioned earlier that according to Laddie, Prescott and Vitoria 'honour and reputation' is 'akin to libel', they also make the point that 'any treatment of a work which tends to trivialise it and to diminish the *respect* (emphasis author's) in which either the work or the author is held runs the risk of a successful action being brought.'⁸¹

Respect in turn is defined as either the 'deferential regard or esteem felt or shown towards a person' when used as a noun,⁸² or as a verb, 'to bear in mind, think of, consider'.⁸³ It is surely uncontroversial to assert that, more often than not, the destruction of an artist's creation neither reflects deep admiration or esteem of the artist on the one hand, nor due regard for his feelings or wishes on the other. Indeed, destruction of the work clearly amounts to an insult or contempt for the author of the work.⁸⁴

5. The Right to Respect or Right not to be Insulted in early English common law

⁷⁷ *The Metaphysics of Morals* (first published 1797).

⁷⁸ Stewart (n 12) 152.

⁷⁹ 'Honour' is defined as 'high respect, esteem, deferential admiration; an expression of this;...' and when used as a verb, as to 'pay respect or do honour to by some outward action; ...regard with honour, respect highly' in the New Shorter Oxford English Dictionary cited in Ellinson and Symonds (n 6) 625.

⁸⁰ The Attorney-General in his Second Reading Speech stated that the moral rights provisions acknowledge 'the great importance of *respect* for the integrity of creative endeavour', cited *ibid* 625.

⁸¹ Laddie, *The Modern Law of Copyright and Designs* (n 55) 1017.

⁸² OED online (accessed 5 August 2014).

⁸³ OED online (accessed 6 August 2014).

⁸⁴ It is acknowledged that occasionally, works of art may be destroyed to bring attention to laudable issues, and it may be argued that such acts are not necessarily contemptuous of the works or artists themselves. For instance, a museum director once destroyed several works in protest against funding cuts, although it should be noted, with the consent of their creators. See John Hooper, 'Naples Museum Director begins burning art to protest at lack of funding' (2012) <<http://www.theguardian.com/world/2012/apr/18/naples-casoria-museum-burning-art-protest>> accessed 19 February 2015 *ibid*.

While there is a case for defining honour as a right to respect, the difficulty for common law lawyers lies in recognising the existence of such a right in the common law. The closest cause of action to a right or claim to respect is defamation, which is well established in the common law, and which explains the tendency among common law judges and academics to refer solely to reputation when dealing with section 80. However, there is a reason why the Berne Convention referred to both honour and reputation, instead of simply one or the other, or why the authoritative French wording of Article 6*bis* made a distinct demarcation between honour and reputation. If the inclusion of honour was regarded as tautologous, it would neither have been included in the first formulation of Article 6*bis* in 1928 nor retained in subsequent revisions to the Berne Convention. Hence, it is arguable at least that the intention of the drafting committee in 1928 as well as that of the delegates to subsequent conferences on the Berne Convention must have been to introduce two distinct terms, and therefore, honour is not and should not be treated the same as reputation.

It will be shown that honour, defined as the right to respect, has played at least an historical role within English common law, and that it is not a completely alien concept. The general position however is that ‘Anglo-American law today is extremely chary of redressing injuries to feelings, honor, or reputation’.⁸⁵ Generally, an action lies only if there is loss or damage to some interest which can be adequately compensated in monetary terms. Even the law of defamation is based on the economic loss to the claimant as a result of injury to his reputation, rather than the affront caused by the libel to personal dignity.⁸⁶ The question is why the common law has developed this aversion to recognising injuries to feelings or honour,⁸⁷ and whether this is truly the position in the common law.

What is clear is that legal historians have unveiled evidence of the recognition of such rights or claims at certain points in the course of England’s history. Beckerman in particular has observed that while the common law does appear to have ignored insults or affronts to honour altogether, at

⁸⁵ Beckerman (n 62).

⁸⁶ *ibid*; Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge University Press 2002) 7; C Strange, R Cribb and CE Forth, *Honour, Violence and Emotions in History* (Bloomsbury Publishing 2014) 195.

⁸⁷ Thomas Benedict Lambert, ‘Protection, Feud and Royal Power: Violence and its Regulation in English Law c.850-c.1250’ (DPhil thesis, Durham University 2009) puts forward the view, derived from Beckerman, that because the royal jurisdiction of the medieval courts was based on the idea of an affront to the honour of the king, everyone else’s honour was disregarded.

some stage in its history, honour played a more central role.⁸⁸ For instance, he notes that it is well established that Anglo-Saxon laws paid more attention to the injured feelings or wounded honour of the victim rather than to the actual conduct of the wrongdoer.⁸⁹ Moreover, the satisfaction of honour remained an important part of the settlement of any dispute from the Norman Conquest until at least the thirteenth century.⁹⁰ While pleas in the royal courts in the thirteenth century rarely included claims for dishonour, they appeared more frequently in those brought before the local courts.⁹¹ The claims for dishonour were in relation to a wide range of wrongs (including breach of contract, defamation and assault for example) and were awarded damages separate from those claimed for the actual wrong.⁹² Further, in a few cases, the amount claimed for dishonour far exceeded that claimed for the actual wrong, thus indicating that the crux of such claims concerned the dishonour itself, similar to claims brought for *iniuria* under Roman law, i.e. the insult caused by the wrong.⁹³

6. *Iniuria* in Roman Law

Iniuria, translated as ‘insult’ or ‘outrage’ may be defined as ‘any contumelious disregard of another’s rights or personality’,⁹⁴ as opposed to economic loss. Whilst originally the concept focused on physical assaults, it widened to include specific wrongs loosely similar to sexual harassment and defamation, and eventually was grounded by an unifying principle of *contumelia* or contempt.⁹⁵ Essentially, by the classical period (from 1st century CE), the wide variety of wrongs that were brought under the umbrella of *iniuria*, were related by the contempt shown to the victim.⁹⁶

⁸⁸ *ibid.*

⁸⁹ Beckerman W.S. Holdsworth and others, *A History of English Law* (Methuen & Company 1909) 51

⁹⁰ Beckerman (n 62) 160 and 167; Beverley-Smith (n 86) 141.

⁹¹ Beckerman, *ibid.*, 173.

⁹² *ibid.* 174-175.

⁹³ *ibid.* 176.

⁹⁴ B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1972) 216.

⁹⁵ Eric Descheemaeker and Helen Scott, ‘Iniuria and the Common Law’ in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law*, vol 9 (Hart Publishing 2013).

Iniuria is so called from that which happens *non iure* (i.e. unlawfully); for everything which does not come about *iure* is said to occur *iniuria*. This is general. But specifically, *iniuria* is said to be *contumelia*.⁹⁷

Contumelia, was equated in Justinian's *Institutes* to the Greek *hubris*,⁹⁸ which in turn has been referred to by Peter Birks as 'a kind of arrogance or pride',⁹⁹ or simply contempt in English. The delict interfered with one's right to an equality of respect,¹⁰⁰ or is simply 'disrespect'.¹⁰¹ The contemptuous act is exercised without taking into account the interests or feelings of the victim.¹⁰² While it was a condition of *iniuria* that there must be an intent to insult, *contumelia* could also be presumed from the intentional commission of the act, although this was a rebuttable presumption.¹⁰³ It should also be noted that in relation to pre-classical (second and third period BCE) *iniuria*, special edicts were pronounced to impose liability in new previously unrecognised situations.¹⁰⁴ It would appear that for two of the special edicts issued, only acts which were *contra bonos mores* i.e. those contrary to the social mores of the prevailing standards, attracted liability.¹⁰⁵ Further, a special edict which dealt with *infamia* or 'shaming' required the subjective intent of the offender in order to attract liability.¹⁰⁶ This was to deal with seemingly lawful acts which are intended to cause offence to the victim of such acts, as 'some shades of intent could turn lawful conduct unlawful.'¹⁰⁷

Another condition for the operation of an action based on *iniuria* was that the victim must have expressed his dismay or anger as soon as he was apprised of the facts pertaining to the offence.¹⁰⁸ It was insufficient to show he was the victim; he must react to the offence. The idea behind

⁹⁷ D 47.10.1 Ulpian, 56 Ad edictum.

⁹⁸ Justinian, *Institutes*, 4.4pr.

⁹⁹ Peter Birks, 'Harassment and Hubris: the right to an Equality of Respect' 32 Irish Jurist 1, 8.

¹⁰⁰ David Ibbetson, 'Iniuria, Roman and English' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law*, vol 9 (Hart Publishing 2013), 40; Peter Birks, 'Harassment and Hubris: the Right to an Equality of Respect' (1997) 32 Irish Jurist 1, 1.

¹⁰¹ Ibbetson *ibid* 40.

¹⁰² Descheemaeker and Scott (n 95) 11.

¹⁰³ Helen Scott, 'Contumelia and the South African Law of Defamation' in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law*, vol 9 (Hart Publishing 2013) 127-128.

¹⁰⁴ Descheemaeker and Scott (n 95) 4.

¹⁰⁵ *ibid* 5.

¹⁰⁶ *ibid* 6-7.

¹⁰⁷ Birks, 'Harassment and Hubris: the Right to an Equality of Respect' (n 99) 13.

¹⁰⁸ D.47.10.11.1.

this rule is not clear and is subject to several possible theories,¹⁰⁹ detailed discussion of which is beyond the scope of this article.

The role that *iniuria* plays in the common law has been explored to a great extent by scholars in Roman law, as well as scholars of laws pertaining to those jurisdictions which have evolved laws rooted in Roman law, famously, Scotland and South Africa.¹¹⁰ Peter Birks, in his lecture *Harassment and Hubris*,¹¹¹ thought that ‘the common law is much nearer than is often thought to a full recognition of the Roman tort,...’. The scholars in these fields have found that analysing the common law through the lens of the Roman tort to be instructive, for instance, it can be seen through this lens that the availability of enhanced or aggravated damages reflects the common law’s recognition that insulting behaviour or attitude deserved to be penalised.¹¹²

It is not intended to present the various arguments and lines of evidence which showcase the extent to which features of *iniuria* appear within the common law. There is already a body of scholarship which has made the point. The recognition of *iniuria* like principles within the common law enables the recognition of sub-interests such as privacy for example, which hitherto have never enjoyed full protection or recognition in the common law.¹¹³ Lawyers and judges in the common law need not exercise their creative powers in stretching the scope of established categories of tort in order to encompass cases which, although clearly involving the commission of a wrong of some type, do not however tick all the boxes of any of the established torts.¹¹⁴

General concepts therefore such as *contumelia*, the right to respect, or affronts to honour, have not been entirely alien to the common law. These themes, originally formulated and rooted in Roman law, have manifested themselves in various guises in the common law. Just as studying and

¹⁰⁹ See Paul Mitchell, ‘Dissinulatio’ in Eric Descheemaeker and Helen Scott (eds), *Iniuria and the Common Law*, vol 9 (2013) for an in-depth discussion of these theories.

¹¹⁰ The influence and heritage of Roman law is explored in depth in *Iniuria and the Common Law* (ed. by Eric Descheemaeker and Helen Scott), a volume comprising a series of essays by scholars in these areas of law.

¹¹¹ Birks, ‘Harassment and Hubris: the Right to an Equality of Respect’ (n 99) 4. See also Scott (n 103) 123.

¹¹² Ibbetson (n 100) 45; Birks, ‘Harassment and Hubris: the Right to an Equality of Respect’ (n 99) 44; WW Buckland, ADMNB McNair and FH Lawson, *Roman Law & Common Law: A Comparison in Outline* (University Press 1952) 382-383.

¹¹³ Birks, ‘Harassment and Hubris: the Right to an Equality of Respect’ (n 99) 44-45.

¹¹⁴ See for example cases such as *Tolley v Fry* [1931] AC 333 and *Huth v Huth* [191] 3 KB 32, analysed in Ibbetson (n 100) 38-39; Buckland, McNair and Lawson (n 112) 383.

understanding how *iniuria* operated assists in helping the common law of tort to evolve, likewise, it furnishes us, for our present purposes, at least some guidance as to how ‘honour’, as it is provided for under section 80, may be applied.

7. The Interpretation of Honour in section 80, and its Effect on Destruction

A. An Interpretation of Honour

Honour, thus, can be seen to mean the right to respect, not only as a mere definition in a dictionary, but also in the fields of anthropology and the law. This is, despite its many variations, its consistent key characteristic. Further, as stated above, *iniuria*, which is arguably a source of personality offences in modern law, appeared to focus on the offender’s act, rather than the victim’s actual feelings. What this means is that for an action to be established in *iniuria*, although it was necessary that the victim felt belittled or angered or offended in some way, and that he made known his feelings,¹¹⁵ it was also sufficient and it was not necessary to examine his feelings any further than that in order to ascertain if they were reasonably held. The delict instead focuses on the intention of the offender so that even if he had committed a strictly lawful act, this could attract liability if he had acted with contempt towards his victim.

Thus, instead of interpreting ‘honour’ as ‘what a person thinks of himself’,¹¹⁶ we can interpret honour in section 80 as underscoring the *author’s right to be treated with respect*, in relation to how his work is treated by third parties.¹¹⁷ While the victim’s actual feelings are obviously important as they constitute the injury which has been suffered, by focusing more on the offending nature of the act itself and also requiring an objective inquiry into the intent of the offender, i.e. by asking if the offender’s act was clearly meant to be *offensive*, it lessens the subjectivity element in section 80. Simply put, instead of having to ask if the victim *actually feels* offended by the act in question and whether it was reasonable for him to have felt so, it would only be necessary to ask if the defendant’s

¹¹⁵ *Confetti Records, Fundamental Records and Andrew Alcee v Warner Music UK Ltd (t/a East West Records)* (n 51) [157].

¹¹⁶ Bently and Sherman (n 10) 257.

¹¹⁷ Ellinson and Symonds (n 6) discuss the context in which ‘honour’ may be prejudiced. WIPO advises that the right to object to derogatory acts which are prejudicial to honour or reputation is sometimes referred to as ‘the right to respect’ and that it is an elastic term. See WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (1978).

act is objectively insulting according to prevailing norms, i.e. *contra bonos mores*, an approach which may also be borrowed from pre-classical *iniuria*.

As Stewart has noted, calling someone a swine is *obviously* offensive, and the victim of the name calling should have the right not to be offended as such. Obvious offence is for instance also conveyed by intentionally spitting in another's face, although it may not necessarily be so by the actual hitting of another, even though the extent of physical injury meted out by hitting would be greater than that caused by spitting.¹¹⁸ This is because there may be some very good and inoffensive reason for hitting another for example, in self-defence or in jest perhaps, but it is difficult to think of an inoffensive reason for deliberately spitting in another's face however. Spitting in another's face is *obviously* meant to be offensive. Such an approach would not only assist in addressing concerns in allowing the unreasonable claims of oversensitive writers and artists,¹¹⁹ but would also capture acts which are objectively offensive but not necessarily detrimental to reputation. For example, a parody of a work would rarely be mistaken by the public as the work of the original author, and hence not affect his reputation.¹²⁰ Aside from the fact that the original author might *feel* offended by the parody, it is clear that a parody is generally *obviously intended* to generate mirth at the expense of the original work and its author, and at best, poke gentle fun at them. There is an obvious element of offence meant in such a situation.¹²¹

Colourisation of films too is an issue which may be addressed by this. If done skilfully, and in today's sophisticated film studios and computer laboratories this is usually the case,¹²² it is unlikely

¹¹⁸ Both acts are of course likely to amount to battery in tort or crime.

¹¹⁹ Deming Liu, 'English copyright law makes the poor "snowman" poorer' (2013) 35 European Intellectual Property Review 674, 680.

¹²⁰ Bently and Sherman (n 10) 257.

¹²¹ It is difficult to define parody with precision. It has been suggested by US Judge Posner that there are two types, 'weapon parody' and 'target parody', where the latter targets the underlying work and/or its author while the former is generally a satire, which targets someone or something other than the work or author. See R. Posner, 'When is Parody Fair?' (1992) 21 Journal of Legal Studies 67. Arguably, a 'weapon parody' which does not target the work or author would probably not be offensive to the author.

¹²² The Associated Press, 'Stooges DVD revives Colorization Debate' (8 September 2004) <http://www.today.com/id/5651949/ns/today-today_entertainment/t/stooges-dvd-revives-colorization-debate/#.U-yEt_ldXmc> accessed 30 September 2014. Bob Simmons, a technical specialist with Sony Columbia Tri-Star, said that the greater range of colours available using digital processes gave the films a more natural appearance, while props used in making the original films are carefully researched and if available, sought out in order to ascertain their actual colours.

that the audience would think any less of the original film maker, and hence his reputation would most likely remain intact. There are economic reasons why broadcasting companies colourise films and television programs. The main reason is that it is increasingly difficult to syndicate black and white films, and by colourising them, there is scope for airing them to a much wider audience. However, there has been much opposition to this process,¹²³ not only for films made in the non-colour era, but also in the period when coloured film technology was readily available. Particularly when colourisation was an option at the time the film was made, and the film was consciously filmed in black and white, the colourisation would be objectively offensive to the film director as it has not only altered the integrity of his work, it has altered the director's artistic vision, and questioned his choice of artistic medium. According to Woody Allen who has chosen to create some films in black and white, 'To change someone's work without any regard to his wishes shows a total *contempt* for film, for the director and for the public.'¹²⁴ The film director's reputation with film audiences may well remain intact especially if the colourisation was performed skilfully and tastefully, or if the audience is made aware that the colourisation was effected by a third party, but not only would the director be likely to feel offended, the colourisation of his black and white artistic vision is objectively offensive and therefore prejudicial to his honour.

Further, by looking at the intention of the *offender*, seemingly lawful conduct may become unlawful, as we have already seen above in the discussion on *iniuria*. It can be seen that this aspect of the delict in particular, if applied to moral rights, would play a significant role. For instance, *prima facie*, the owner of an artwork has private property rights over that artwork and ostensibly has the right to do whatever he wishes with it. Should he choose to maltreat or even destroy it however, he would be perfectly within his legal rights to do so.¹²⁵ The maltreatment/destruction is therefore a

¹²³ 'Colorization of Black-and-White Movies' (*Senate Judiciary Subcommittee on Technology and the Law*, 1987) <<http://www.c-span.org/video/?56772-1/colorization-blackandwhite-movies>> accessed 30 September 2014. Woody Allen, Milos Forman and Sidney Pollack were among witnesses who appeared before the US Senate Judiciary Subcommittee to present their views on the colourisation of black and white films.

¹²⁴ Jack Mathews, 'Film Directors see Red over Ted Turner's Movie Tinting' (1986) <http://articles.latimes.com/1986-09-12/entertainment/ca-12040_1_ted-turner> accessed 30 September 2014.

¹²⁵ This issue of course is not as simple as that. There is an inherent tension between private property rights over artworks and moral rights of the artist. An in-depth discussion of this issue with regard to the right to destroy property can be found in Lior Jacob Strahilevitz, 'The Right to Destroy' (2005) 114 Yale Law Journal 781.

lawful act. However, in maltreating/destroying the artwork without due regard for the feelings of its author, the owner has acted contemptuously, and such an act could conceivably be an *iniuria*.

It has to be pointed out here that care must be taken in automatically drawing this conclusion. There is an inevitable tension between the owner's property rights over an artwork and the moral rights of the artist. It is recognised that there are situations in which the owner's reasons for destroying the artwork are not only understandable, but also good and valid, and more importantly they reasonably override considerations of any regard for the artist, and hence not necessarily constitute an *iniuria*. Indeed, Paul in D.47.10.33 seemed to regard *contra bonos mores* as an essential element for liability in *iniuria*:

Where something is done in the public interest according to sound morals, even though it is to the disrespect of someone, nevertheless, because the magistrate does it not with a mind to doing *iniuria* but to assert public *maiestas*, he is not liable to an action *iniuriarum*.

While the text is a little confusing because the reference to the magistrate is not explained, nevertheless, it is clear that according to Paul, the absence of *contra bonos mores*, excluded liability in *iniuria*.¹²⁶

For instance, if the owner either merely takes a dislike to the artwork or rejects it on some ideological ground, it is an *understandable* reason for destroying it, but it is not necessarily a good and valid reason to simply destroy the artwork without more or indeed a sound public interest reason. Indeed, if the reason for destroying the work is based on ideological grounds, this amounts to an outright rebuff of the artist's vision. Destroying an artwork under such circumstances demonstrates utter disregard for the artist's feelings and hence is contemptuous. There are many examples of this, ranging from the destruction by Lady Churchill of Sutherland's portrait of Winston Churchill (which is discussed below), to the destruction of Diego Rivera's mural, *Man at Crossroads* at the behest of its

¹²⁶ Ibbetson (n 99) 43.

commissioner, the Rockefellers.¹²⁷ Another example is the insidious practice of cutting up artworks into pieces, mainly for profit, as the separate sales of individual pieces may add up to more than the asking price for the artwork in its entirety. Such a travesty occurred in 1986 when a Picasso linocut print was cut up into 500 separate pieces by an Australian mail order company.¹²⁸

On the other hand, an example of a good and valid reason which could legitimately override any concern for the artist would be public health and safety. In 2010, for health and safety reasons, security staff at the Royal College of Art destroyed a student artwork which consisted of a stairway erected between the college's building and a fish and chip shop next door. Although sympathetic towards the student artist's plight, the college rector emphasised that the safety of students and visitors would not be put at risk for the sake of maintaining the work.¹²⁹ However, health and safety reasons have been raised in the past on spurious grounds, primarily as a smokescreen for the true sentiments behind the destruction of artworks. Jacob Epstein's nude statues on the British Medical Association's headquarters sparked intense controversy from the moment they were unveiled. For a period of almost thirty years, a continuous campaign was waged from different quarters against the statues. When finally part of one statue fell onto the street below, this gave the then owner of the building a reason to destroy the works. Mundy, art historian and Head of Collection Research at the Tate Modern, laments that '...what had been a grand public statement by one of the greatest modernist sculptors...was lost, notionally on the dubious, and somewhat inglorious grounds of 'health and safety'.'¹³⁰

Nowhere is the tension between property rights, public interest and moral rights more apparent than in legal dispute which raged over Richard Serra's *Tilted Arc*, a monolithic steel wall which traversed Federal Plaza in New York. Office workers from the buildings which surrounded the

¹²⁷ 'Rockefeller Centers Ousts Rivera and Boards Up Mural' (10 May 1933) <http://roads.virginia.edu/~MA04/hess/RockRivera/newspapers/NYHerald_05_10_1933.html> accessed 29 September 2014.

¹²⁸ Nicholas Forrest, 'Picasso Gets the Chop!!' (2008) <<http://www.artmarketblog.com/2008/04/17/picasso-gets-the-chop-artmarketblogcom/>> accessed 29 September 2014.

¹²⁹ Louise Jury, 'Artist's Degree Work Destroyed over Safety Fear' (2010) <<http://www.standard.co.uk/news/artists-degree-work-destroyed-over-safety-fear-6483321.html>> accessed 1 October 2014.

¹³⁰ Jennifer Mundy, *Lost Art* (Tate Publishing 2013) 87.

plaza were infuriated with the structure, and petitioned its removal. A security expert gave evidence as to the sculpture's propensity for encouraging criminal and terrorist activity. As a result, the owners held a public hearing, at which almost two hundred artists and experts gave testimony in the sculpture's favour. The panel, after hearing both views, those of the public as well as those of the art world, chose to remove the sculpture. A furious Serra then sued the government agency which commissioned the work, claiming a breach of his moral rights. The court dismissed his claim, ruling that it was the property of the agency and therefore it had the right to dispose of the work. According to Serra, the legal outcome '[affirmed] the government's commitment to private property over the interests of art or free expression.'¹³¹

The above discussion demonstrates the inherent tension between property rights and moral rights, an issue which deserves a more in-depth discussion. This article merely makes the point that while the owner who destroys an artwork in his possession may simply be exercising his legal rights, unless there are good, valid and overriding reasons for the destruction, it amounts to a contemptuous disregard for the artist. A further point may also be made that the owner of a work of art is its guardian, responsible for its posterity.¹³²

Further, as discussed above in the introduction, the product of a creative process practised in the fine arts is the embodiment of its author's personality, and hence callous destruction of the product would amount to callous disregard for the personality of its author, and is *prima facie* insulting. Any maltreatment or the destruction of the artwork may therefore raise at least a *presumption* of contempt towards the artist, attracting liability. It should be remembered that only a rebuttable presumption is raised, so that in a few instances, such an act could possibly be deemed inoffensive. An example would be when an artist, *with the full consent* of another artist, destroys the work of the second artist. Exactly such a situation occurred when Robert Rauschenberg, with Willem de Kooning's permission, erased one of de Kooning's works, in order to create a 'new' work. In an interview, Rauschenberg

¹³¹ Richard Serra, 'Art and Censorship' (1991) 17 Chicago Journals 574, 574.

¹³² Julius S Held, 'Alteration and Mutilation of Works of Art' (1963) 62 The South Atlantic Quarterly 4, 26.

explained that he ‘...erased the de Kooning *not* out of any negative response.’¹³³ This arguably was not a situation where the destroyer clearly intended to offend the author of the destroyed work.

It is important at this juncture to briefly contrast the aforementioned examples of parodies and the colourisation of films with the act of destruction generally. It could be argued that parodies and the colourisation of films are arguably creative works in their own right. Much skill and creativity goes into the creation of a good and humorous parody, and above all, they also play a valuable role as a form of criticism of the work on which they are based, and as such it has been argued that the law should recognise protection for such forms of work.¹³⁴ Again, much skill and creativity goes into the selection of the appropriate hues and contrasts in producing a sympathetic colourised version of a black and white film, and colourised versions will make black and white films more palatable and accessible to modern audiences today. Arguably there are possible public interests in these activities. There is therefore an argument that caution should be exercised in imposing restrictions on activities which are arguably creative and socially beneficial, and that an author’s honour may not necessarily override such public interests. Destruction on the other hand leaves nothing in its wake. Apart from the Rauschenberg episode, there is nothing creative about destroying a work of art, and generally, one is hard pressed to find a public interest in the destruction of a creative work.¹³⁵ A detailed discussion of the relative merits of parodies, colourisation and ‘destruction as art’ is beyond the scope of this article and it suffices to remind ourselves that, in the absence of a clear statutory exception, and bearing in mind the above arguments, the courts may exercise restraint in deeming creative acts such

¹³³ Vincent Katz, ‘A Genteel Iconoclasm - Robert Rauschenberg’ (*Tate etc*, 2006)

<<http://www.tate.org.uk/context-comment/articles/genteel-iconoclasm>> accessed 30 September 2014.

¹³⁴ Much has been written on the impact of copyright and moral rights on parodies. See for example, Geri J. Yonover, ‘The Precarious Balance: Moral Rights, Parody, and Fair Use’ (1996) 14 *Cardozo Arts and Entertainment Law Journal* 79; Maree Sainsbury, ‘Parody, Satire, Honour and Reputation: The Interplay between Economic and Moral Rights’ (2007) 18 *Australian Intellectual Property Journal* 149; Tania Cheng, ‘The Power of Potter: Copyright Law and its Influence on Sequels and Parodies’ (2013) 49 *Forum for Modern Language Studies* 1.

¹³⁵ Although health and safety has been raised earlier in this article as a sound justification for destruction, and is arguably a public interest, it has also made the point that on occasion such reasons are questionable, for instance, when Jacob Epstein’s nude statues were demolished on such basis. It has been thought that health and safety reasons are very often raised to obscure the true intentions behind difficult decisions in many situations, not just in the destruction of art. See Claire Dunlop, *Health and Safety Myth-Busters Challenge Panel: Case Analysis* ((Report) (December 2014) University of Exeter, 2014).

as parodies and colourisation as treatments prejudicial to the honour or reputation of the original authors.

B. Honour v Reputation – Effect on Destruction

Honour, in contrast to reputation, is not concerned with public knowledge of the act which interferes with his work. As stated above, reputation is, unlike honour, essentially economic in character. The ruination of an author's public image or his reputation will in turn impinge upon his future income. Thus, this is why the courts, in discussing cases involving the author's integrity right, have been so concerned with the final "product" after the alleged maltreatment by the defendant. Does the work, after being subject to the defendant's treatment, have the capacity to prejudice the author's reputation? In other words, would the public, upon seeing the end result, have a markedly negative perception of the author and his works? The answer is never clear as some treatments may not only simply have little or no effect on the public's perception of the author, but may even enhance the author's reputation. For example, substantial editing of a written work in which fundamental errors of fact or simply bad grammar are corrected, would possibly amount to a substantial treatment of the original work under section 80, but would arguably not prejudice the author's reputation. Where destruction of a work is concerned however, the consequence of such an act is unmistakable. The end result of an act of destruction is the same, no matter what the subject-matter involved is – the work is simply no more, and need not be subject to the same level of scrutiny by the courts.

However, as already stated above, destruction leaves nothing behind which can affect the author's reputation, and as such, there is a considerable body of academic and judicial opinion that destruction does not amount to a breach of the integrity right.¹³⁶ This is for example reflected in the following statement by Roeder,

¹³⁶ See n 9 above. Arguments against allowing objections to be raised against the destruction of works are discussed above.

‘To deform [the creator’s] work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for a work he has not done; the destruction of the work does not have this result.’¹³⁷

Further, the House Report related to the enactment of the US Visual Artist’s Rights Act (VARA) in 1990 noted that

‘Some Berne members do not include destruction of a work within the right of integrity because theoretically, once the work no longer exists, there can be no effect on an artist’s honor or reputation.’¹³⁸

In *Carter v Helmsley-Spear, Inc.*, a US case in which the plaintiffs invoked VARA, the Second Circuit remarked that ‘...destruction is seen as less harmful than the continued display of deformed or mutilated works that misrepresent the artist.’¹³⁹

The idea behind the sentiments articulated above is that something else other than the author’s original work is represented as his, which is *communicated or conveyed to the public* and hence harms the public’s perception of him and his work. Similarly, harm to reputation in defamation occurs only when the libellous words are *published*. Until then, there is no harm. It should also be remembered at this juncture that additional requirements in section 80, subsections (3), (4) and (6) emphasise the requirement for public knowledge of the treatment meted out to the work. It makes the author ‘subject to criticism’ by the public according to Roeder above, in other words, subject to a negative evaluation by the public, which is, simply put, a slight on his reputation. The maltreated, mutilated or deformed work influences or works on the mind of the public and hence has an effect on the author’s reputation, and it is thought that continued display of the mutilated work causes more harm than simply destroying it entirely. By contrast, evidently after destruction, there is nothing left that can be *communicated or conveyed to the public*, and therefore nothing that can affect *what the public thinks*

¹³⁷ Martin A. Roeder, ‘The Doctrine of Moral Right: a study in the Law of Artists, Authors and Creators’ (1940) 53 Harvard Law Review 554, 565.

¹³⁸ H.R. REP No. 514, 16.

¹³⁹ *Carter v Helmsley-Spear, Inc.* 71 F.3d 77 (2d Circuit), 81-82.

of the author. It can be seen that the focus is on the public's perception, in other words, the effect on the author's reputation.

It is therefore manifest that what various commentators had in mind, when they opined that destruction leaves nothing behind which can harm the author, is reputation. As already mentioned above, in analysing cases involving the right of integrity, academic texts and judicial opinions emphasise the effect of the treatment of a work on the *reputation* of the author, and any academic or judicial attempts at defining the honour limb of section 80 simply echo definitions of the concept of reputation, instead of attempting to distinguish honour from reputation. Honour appears to have been left on the wayside to all intents and purposes.

While reputation may not be affected by destruction, it is submitted that honour may be prejudiced by such an act. *Contumelia* which has been defined as the act of treating the victim contemptuously, or without regard to his feelings or interests would similarly describe the situation here. The person who destroys a work of art has not taken into account the feelings of the work's author, or if he has, he has simply dismissed them as unimportant before proceeding to destroy the work. The destroyer may have good reason to want to destroy the work. For instance, the Churchills famously had an intense dislike of Winston's Churchill's portrait painted by Graham Sutherland,¹⁴⁰ and had it destroyed. Although Sutherland was magnanimous in saying that he was not 'unduly distressed', as he might well be, he strongly denounced the act as 'without question an act of vandalism', strong terms indeed, thus revealing the true depths of his feelings about the matter.¹⁴¹ Even if Sutherland himself was not really distressed, the very act of destroying the portrait was a display of the contempt the Churchills had for the portrait, and even Sutherland himself. Putting aside difficult and ambivalent issues regarding property ownership,¹⁴² the ethics of destroying artworks and

¹⁴⁰ Churchill apparently had said that the portrait made him look half-witted, and that he looked as if he was perched on the lavatory. See Mundy (n 130) 100; Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press 1999) 38.

¹⁴¹ AP, 'Churchill's Wife Destroyed Portrait' *Observer-Reporter* (Pennsylvania, 12 January 1978) 33 <<http://news.google.com/newspapers?id=OvddAAAIBAJ&sjid=j18NAAAIBAJ&pg=1359%2C1485569>> accessed 5 August 2014.)

¹⁴² David Sylvester said: 'I do not think we have the right to feel we own the works of art we have, any more than the spouse we have. Therefore we should not kill them off just because we do not like them.' Sax (n 140) 39.

the potential loss of cultural heritage,¹⁴³ it is at least clear that the effect such an act would have on the artist is profoundly upsetting, which is best described in the following statement by Roy Strong, director of the Victoria and Albert Museum, ‘...an artist tears something out of himself when he paints a portrait and to burn it is like burning a chunk of Sutherland.’¹⁴⁴ This statement is not as incredible as it sounds, especially if we understand the author’s work to be ‘an embodiment of the author’s personal meaning and message’,¹⁴⁵ or even something akin to an offspring of the author’s,¹⁴⁶ and therefore it would be obvious and natural to most that the destruction of the author’s work is obviously deeply offensive and wounding at worst, insensitive and tactless at best, redolent of the features of *contumelia*.

Whilst Sutherland’s honour may have been acutely prejudiced by the destruction of the Churchill portrait, his *reputation* appears not to have been affected much by the incident, apart from some short term notoriety in the popular press.¹⁴⁷ His standing, however, as an important artist, remained generally unsullied. A few years after the presentation of the portrait, Sutherland was awarded the Order of Merit,¹⁴⁸ and even though his style of painting gradually became unfashionable in some quarters, his works have been regularly exhibited long after his death in 1980.¹⁴⁹ When asked if the Churchill controversy would have the effect of clouding Sutherland’s memories, Sir Kenneth Clark, in an interview held in 1980, replied firmly in the negative.¹⁵⁰ Even if destruction had been recognised at the time as a breach of the integrity right,¹⁵¹ Sutherland may have found it difficult to establish his claim as there was evidence that his reputation was not unduly affected by the

¹⁴³ *ibid* 38-41.

¹⁴⁴ *ibid* 39; Mundy (n 130) 101-102.

¹⁴⁵ Kwall (n 13) xiii.

¹⁴⁶ *ibid* xiv and 2.

¹⁴⁷ http://english.ohmynews.com/articleview/article_view.asp?at_code=278128 (accessed 5 August 2014).

¹⁴⁸ <http://www.tate.org.uk/art/artists/graham-sutherland-om-2014> (accessed 5 August 2014).

¹⁴⁹ See Laura Cumming, ‘Graham Sutherland: An Unfinished World - Review’ *The Observer* <<http://www.theguardian.com/artanddesign/2011/dec/18/graham-sutherland-unfinished-world-review>> accessed 5 August 2014 for a review of an exhibition of eighty of Sutherland’s works, held from 10 December 2011 to 18 March 2012 at Modern Art Oxford.

¹⁵⁰ Unidentified Interviewer, Interview with Art Historian Sir Kenneth Clark, *Death of Graham Sutherland* (LBC/IRN 1980) <http://bufvc.ac.uk/tvandradio/lbc/index.php/segment/0001700462015> (Accessed 05 Aug 2014).

¹⁵¹ Dworkin states that even if the Sutherland incident had occurred after the enactment of CDPA, he could have done nothing. See Gerald Dworkin, ‘The Moral Right of the Author: Moral Rights and the Commonlaw Countries’ (1994) 19 *Columbia Journal of Law & the Arts* 229, 250.

destruction, even though the requirement is that the treatment is *prejudicial*, not that it *has prejudiced* the reputation of the author. However, as we have seen above, destruction of an artwork is clearly an act which is insulting to the artist, and as such, prejudice to honour could have been a basis on which Sutherland could have made his claim.

It is not to say that the reputation of an artist can *never* be affected by destruction of one or more of his artwork. In fact, it is abundantly evident that, despite the absence of something tangible which may affect public opinion, the destruction of an artist's work can also affect his reputation profoundly. First of all, the destruction of an artwork would reduce the corpus of the artist's life work, as well as possibly his financial standing,¹⁵² hence giving the *prima facie* impression that the artist has a smaller repertoire than he has actually produced.¹⁵³ According to Stamtoudi,

In other words, the destruction of a work may diminish the professional image and standing of the author by eliminating one of his creations. Especially in cases where the reputation of an author depends on a limited number of creations, the destruction of even one of them may substantially affect his status.¹⁵⁴

Secondly, the knowledge that an artwork has been deliberately destroyed would surely at least raise questions in the public's mind regarding the worth of the artwork, especially if the destruction had been carried out by a notable personage, particularly one who is a patron of the arts or with some substantial background in the arts. To the public, there must have been some reason that the work was not worth preserving. That said, even if it is true that an artist's reputation can never be affected by the destruction of one of his artworks, which is disputed as argued above, the artist's honour has surely been prejudiced at least.

¹⁵² It should also be noted that destruction may well affect an artist's finances in the long term as once his work is destroyed, he would no longer receive the potential royalties from resale of that work. Under the Artist's Resale Right, an EU right introduced into the UK in 2006, an artist may receive a royalty each time his work is sold in the art market through a gallery, auction house or art dealer.

¹⁵³ Rajan (n 9) 46. It was held in *Seghal v The Union of India HC (Ind)* FSR that by reducing the author's body of work, his reputation will be prejudiced. The authors in Copinger and Skone James however do not believe that this line of reasoning will be followed in the UK, although they give no explanation as to why this should be so. See Garnett and others (n 53) pt II, para 11-47.

¹⁵⁴ Stamtoudi (n 9) 483.

By re-interpreting honour as a right to respect, UK moral rights law is in a position to give full countenance to not only the legal rights of artists, but more importantly to the *respect* which they seek and in most cases, of which they are deserving. It is not always the case that monetary rewards incentivise creative enterprise among writers and artists; respect is equally, if not more, important to such authors. Such a viewpoint has been expounded robustly in Kwall's *The Soul of Creativity*.¹⁵⁵ According to her work, by commodifying creative works and focusing solely on the economic incentives, the law has lost sight of what is truly important to the writers and artists in society. Ong, in his article,¹⁵⁶ also expressed his concerns for the growing interest in emphasizing the economic efficiency and value maximization of moral rights.¹⁵⁷ He questioned an innovative study by Hannsman and Santilli,¹⁵⁸ which engaged in an economic analysis of moral rights, pointing out that their thesis assumed that the integrity right protected reputational interests, thus unduly elevating the pecuniary interests of the author, while marginalising the non-pecuniary ones.¹⁵⁹ Re-interpreting honour in section 80 would assist in recognising the respect which should be accorded to UK's authors, and also enable UK copyright law to focus beyond merely the economic rights of authors.

In this respect, there is a further lesson to be learnt from the Romans. There is evidence that the Romans recognised the non-economic character of honour on the one hand, and conversely, the economic character of reputation on the other. According to Pound, three general forms of *iniuria* were recognised: real or physical injury, symbolic injuries such as affronts to honour, and pecuniary interests, which included injuries to reputation.¹⁶⁰ Thus, a distinction was made between injuries such as affronts to honour and injuries such as damage to reputation, the latter being of an economic character. As already mentioned above, injury to a professional person's reputation can result in harm to his financial standing, in that he not only stands to lose his current clients or customers, he may also

¹⁵⁵ Kwall (n 13).

¹⁵⁶ Burton Ong, 'Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights' (2003) 26 *Columbia Journal of Law & the Arts* 297.

¹⁵⁷ *ibid* 312.

¹⁵⁸ Henry Hansmann and Marina Santilli, 'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis' [The University of Chicago Press for The University of Chicago Law School] (1997) 26 *The Journal of Legal Studies* 95.

¹⁵⁹ Ong (n 156) 307.

¹⁶⁰ Roscoe Pound, 'Interests of Personality' (1915) 28 *Harvard Law Review* 445 at 449-450.

lose potential clients or customers.¹⁶¹ The damage to one's honour however cannot be as easily quantified in monetary terms, but is nevertheless just as palpable an injury which should not be ignored.

8. Conclusion

Honour is a very different creature from reputation. Interpreted as a right to respect, it need not require a public display of the act in question, and furthermore would encompass the entire destruction of works, which at the moment is not recognised as treatment which is prejudicial to honour or reputation under moral rights. While the victim's feelings are relevant and important, the court need not base their judgment wholly on them, which is arguably undesirable as unreasonable claims by hypersensitive artists might be allowed. However, if the focus is trained on the act itself, in order to ascertain if it is objectively offensive, then this would ameliorate the risk of allowing unreasonable claims by hypersensitive artists. Where destruction is concerned, it has been argued above that, unlike mutilations or other modifications, the effect of destruction on a work is unambiguous, and the *prima facie* intent behind the act is, at least, disrespect or a complete disregard for the honour of the artist. The argument that destruction is at least *prima facie* insulting or contemptuous to the author, has been noted by William Patry, 'One could argue however that destruction of a work shows the *utmost contempt* for the artist's honour or reputation.'¹⁶² Despite the reference to both honour and reputation, Patry makes the point that destruction is *clearly* a contemptuous act. Hence, destruction constitutes a clear prejudice to the honour of the author, even if his reputation remains unaffected.

¹⁶¹ Beverley-Smith (n 86) 11.

¹⁶² WF Patry, *Copyright Law and Practice* (Bureau of National Affairs 1994) fn.128, 1044.

